verdict when the High Court acquits a person tried by it and that that acquittal should remain in force — unless of course the prosecution was invalid because of the want of necessary sanction.

This acquittal could not have been quashed and in my view has not been quashed by this court.

Applying both subsection (i) of section 302 of the Criminal Procedure Code and clause (2) of article 7 of the Constitution which read:

"302. (i) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167."

"7. (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

I would therefore have allowed this appeal.

The order of the court is that this appeal be dismissed, the convictions be affirmed but the sentences be varied as stated in the judgment of the learned Chief Justice.

Appeal dismissed.

Solicitors: *Seenivasagam & Co.*

KEE PENG KWAN v. COLONEL V.N. STEVENSON & ORS.

[F.C. (Suffian L.P., Ong Hock Sim F.J. and Chang Min Tat J.) April 22, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 152 of 1974]

Administrative Law — Application for order of prohibition — Proceedings before General Court Martial — Plea to jurisdiction of court — Allegation that charge not investigated into by Commanding Officer — Who is Commanding Officer of applicant — Malay Regiment Enactment (F.M.S. Cap. 42), ss. 42(1), 124(7) and 117A.

Armed Forces — Malay Regiment — General Court Martial — Jurisdiction.

The appellant had been charged with an offence under section 14 of the Malay Regiment Enactment for fraudulent misapplication of Government property entrusted to his care. At the trial counsel for the appellant had offered a plea to the jurisdiction. It was alleged that the Commanding Officer of the appellant had not investigated into the charge against him. The Court Martial after hearing the evidence and submissions allowed the plea and duly reported to the convening officer under Rule 36(2) of the Rules of Procedure (Army) 1956. The convening officer then purporting to act pursuant to Rule 36(3) directed the Court Martial to proceed with the trial. The court was then reconvened. The appellant subsequently applied for an order of prohibition prohibiting the General Court Martial from proceeding with the hearing of the charge against the appellant. The application was dismissed in the High Court and the appellant appealed to the Federal Court.

Held: the materials before the court were insufficient to show that Major Idrus, who investigated in this matter, was the Commanding Officer of the appellant according to law. The Court Martial was correct in coming to the conclusion that it had no jurisdiction and there was no foundation, either in law or in fact for over-ruling the finding of the Court Martial on the question of absence of jurisdiction. In the circumstances prohibition must lie.

Case referred to:-

(1) *Grant* v. *Gould & Ors.* (1792) 2 Hy. Bl. 69.

FEDERAL COURT.

Wong Chong Wah (*H. Jayaraam* with him) for the appellant.

Tam Kam Weng (Senior Federal Counsel) for the respondents.

In the court below, *H. Jayaraam* appearing for the applicant and *Noor Hamid bin Mohamed Noor* for the respondents, the following judgment was delivered on October 24, 1974:

Abdul Hamid J.: This is an application by Major Kee Peng Kwan (1) for an order of prohibition prohibiting the General Court Martial or its President or Members from proceeding with the hearing of a charge against him under section 14 of the Malay Regiment Enactment (F.M.S. Cap. 42); (2) for the proceedings before the General Court Martial to be stayed after the determination of this motion.

The court is essentially concerned with prayer (1). The grounds upon which the relief is sought are as follows —

(a) The General Court Martial has no jurisdiction to hear the charge against the applicant since the Commanding Officer of the accused (applicant) has not investigated the charge and that the essential preliminary steps envisaged in section 42(1) of the Malay Regiment Enactment have not been complied with;

(b) Rule 36(b) of the Rules of Procedure (Army) 1956 which permits the Convening Officer to direct the General Court Martial to proceed with the hearing of the charge despite its finding of no jurisdiction is *ultra vires* and unconstitutional;

(c) There is an error on the face of the direction given by the Convening Officer to the General Court Martial, and the said direction cannot confer jurisdiction on the General Court Martial having held that it has no jurisdiction; and

(d) Any finding that the General Court Martial may make after the hearing of the charge will be null and void and of no effect.

Ground (d) is merely consequential. It would only arise if this court should rule that the General Court Martial had no jurisdiction to hear the charge against the applicant.

The applicant affirmed an affidavit to the effect that he was brought before the General Court Martial on January 29, 1973 to be tried for fraudulent misapplication of public property under section 14 of the Malay Regiment Enactment. At the trial counsel appearing for the applicant offered a plea to the jurisdiction and evidence was adduced to show that section 42(1) of the Malay Regiment Enactment had not been complied with. The applicant alleged that the person who investigated the offence was not his Commanding Officer.

The General Court Martial allowed the defence plea of jurisdiction and acting under Rule 36(2) of the Rules of Procedure (Army) 1956, the General Court Martial adjourned and reported its finding to Col.

Abul 'As bin Ismail, Commander of the Kuala Lumpur Garrison (who I shall call "the Convening Officer"), who convened the court martial. The Convening Officer disapproved the finding of the court martial and directed the General Court Martial to proceed with the trial acting under Rule 36(3)(b).

The applicant alleged that this rule was *ultra vires* and unconstitutional. He further alleged that there was an error on the face of the direction and the Convening Officer could not confer jurisdiction on the tribunal when it had no jurisdiction. At the hearing before me Mr. Jayaram counsel for the applicant submitted that Major Idrus was not the Commanding Officer and he had no power to investigate and that he had not in fact investigated. He further submitted that even if he had the power to investigate he had not the power to delegate. It was the applicant's case that when the investigation started which was on February 7, 1972 the applicant was not attached or posted to Camp Ministry of Defence.

Encik Noor Hamid bin Mohd. Noor for the respondents argued that the investigation was made pursuant to Rule 7 of the Rules of Procedure and this rule was complied with. He further argued that there was no requirement that the abstract of evidence be taken by the Commanding Officer. It could be effected by any officer attached to the unit of the Commanding Officer and that in the instant case Major Hasbullah was properly directed by Major Idrus the Commanding Officer.

Counsel for the applicant referred to section 42 of the Malay Regiment Enactment the relevant part of which reads —

"42 (i) The commanding officer may, upon an investigation being had of a charge made against a person subject to military law under his command of having committed an offence under this Enactment, dismiss the charge, if he in his discretion thinks that it ought not to be proceeded with, but where he thinks the charge ought to be proceeded with, he may take steps for bringing the offender to Court-Martial, ..."

The respondents on the other hand referred to Rule 7 of the Rules of Procedure which states that —

". . . when a commanding officer investigates a charge he shall first read and, if necessary, explain the charge to the accused and shall then:—

(a) hear the evidence himself in accordance with Rule 8; or

(b) cause the evidence to be reduced to writing, in accordance with paragraph (2) of this Rule, and read and consider it:"

Paragraph (2) of Rule 7 reads —

"(2) Evidence may be reduced in writing in the form of a summary of evidence taken in accordance with Rule 10:"

Rule 10 permits the abstract of evidence to be made by the Commanding Officer or *by another officer on the direction of the Commanding Officer.* (The italics are mine).

Who was the applicant's Commanding Officer at the material time? This is the question that I shall first of all determine. Col. Abul 'As, Commander of the Kuala Lumpur Garrison as from June 1, 1972 affirmed that Major Idrus Maaris, the Camp Commandant, Camp Ministry of Defence, was the Commanding Officer of the applicant at the material time. He also affirmed that Major Idrus conducted the investigation. This was done in accordance with section 42(1) in the manner prescribed by Rule 7 of the Rules of Procedure. Major Idrus also affirmed an affidavit where he stated that he was the Camp Commandant, Camp Ministry of Defence as from March 3, 1969 until April 15, 1973 and the applicant served as Staff Officer Grade II in the Directorate of Military Training, Ministry of Defence from August 2, 1971 to December 15, 1972. On February 7, 1972, the applicant was charged before him for having fraudulently misapplied government property entrusted to his care. Major Idrus also stated that by virtue of his attachment to the Directorate of Military Training, Ministry of Defence, he (Major Idrus) was the Commanding Officer of the applicant. He further stated that he acted in accordance with Rule 7(1)(b) of the Rules of Procedure (Army) 1956 of the British Army as applied to the Malaysian Army by the Federation Military Forces (Procedure) Rules 1957 (L.N. 51/57). He ordered Major Hasbullah bin Yusuf to take abstract of evidence. On receipt of statements and after he had read and considered them, he remanded the applicant to be tried by court martial. He submitted the charges to Col. Abul 'As as Convening Officer on October 10, 1972 for a court martial to be convened.

Major Idrus explained that the applicant was posted to the "X" List of the Ministry of Defence and attached to Engineer Branch of the Ministry of Defence as from December 1972 and by virtue of attachment to the Engineer Branch, Ministry of Defence, the applicant continued to come under his jurisdiction in matters of discipline and administration.

There is also the affidavit of Col. Yaacob bin Mohd. Zain who affirmed that the applicant was posted to 5 Engineers Service, Ministry of Defence taking over appointment as Staff Officer Grade II in the Directorate of Army Training, part of Army Staff Division, Ministry of Defence on August 2, 1971, vide "YMZ1". The applicant therefore came under the jurisdiction of the Camp Commandant, Ministry of Defence for purposes of administration and discipline.

After considering the materials before me, I was satisfied that Major Idrus was the Commanding Officer of the applicant at the material time. He acted properly and in accordance with the procedure governing the methods of investigating charges. To my mind there was sufficient compliance with section 42(1) of the Malay Regiment Enactment Cap. 42. The applicant's complaint is essentially on the ground that there had been no proper investigation because Major Idrus was not his Commanding Officer at the material time. He affirmed in his affidavit that the preliminary steps were taken by Major Idrus but they were not duly taken because Major Idrus was not his Commanding Officer. The applicant did not seem to challenge the first limb of Rule 7 which initially requires the Commanding Officer to read, and, if necessary, explain the charge to the accused, and then, (only then) hear the evidence himself in accordance with Rule 8 or cause abstract of evidence to be taken in accordance with Rule 10.

For reasons that I have stated, I am therefore firmly of the view that the applicant's first ground must necessarily fail.

Now, grounds (2) and (3) may conveniently be dealt with together. After careful perusal of the

relevant rules under which the Convening Officer purported to act when he disapproved the General Court Martial's decision, it seems clear in my mind, that it was solely for the Convening Officer to consider whether in a particular case to approve or disapprove the General Court Martial's decision in regard to plea of jurisdiction. It would also seem clear that the reason that led the Convening Officer to disapprove the General Court Martial's decision in the instant case was for reason that Major Idrus was the Commanding Officer of the applicant. To my mind, the Convening Officer was fully qualified to say whether or not Major Idrus was the Commanding Officer of the applicant at the material time. The applicant has failed to provide me with any authority to enable me to arrive at a finding that the provision conferring power upon the Convening Officer under Rule 36 was *ultra vires* and unconstitutional. In any event I am satisfied that there is nothing whatever to show that the Convening Officer had acted improperly or in excess of the power conferred upon him by paragraph (3) of Rule 36.

It was for these reasons that I held that the application lacked merit and dismissed the application and consequently set aside the interim order made on March 7, 1973.

The applicant appealed from the above decision to the Federal Court. Judgments delivered in the Federal Court were as follows:

Ong Hock Sim F.J.: This appeal is concerned with the dismissal of the appellant's application (1) for an order of prohibition, prohibiting the General Court-Martial or its President and Members from proceeding with the hearing of a charge against him under section 14 of the Malay Regiment Enactment (F.M.S. Cap. 42) and (2) for the proceedings before the General Court-Martial to be stayed until after the determination of this motion and (3) costs incidental thereto.

There were eleven grounds of appeal, some of which overlapped and two were consequential. To my mind, only one issue was involved, as Encik Noor Hamid bin Mohd. Noor rightly stated before the High Court, namely whether Col. Abul 'As' direction pursuant to Rule 36(3)(b)(i) is "constitutional" or, as contended by the appellant, "*ultra vires* and unconstitutional."

I set out briefly the undisputed facts. The appellant, Major Kee Peng Kwan, was charged on February 7, 1972, with an offence under section 14 of the Malay Regiment Enactment for fraudulent misapplication of Government property entrusted to his care. The appellant was subsequently brought for trial before the General Court-Martial on January 29, 1973. In accordance with Rule 36(1) of the Rules of Procedure (Army) 1956 as the British Army, as applied to the Malaysian Army by the Federation Military Forces (Procedure) Rules, 1957, his counsel offered a plea to the jurisdiction of the court. After hearing evidence and submissions of the Prosecutor and appellant's counsel, the court allowed the plea and duly reported to the Convening Officer pursuant to Rule 36(2) on January 31, 1973. The Convening Officer then purported to act pursuant to Rule 36(3) and directed the Court-Martial to proceed with the trial. The court reconvened on February 26, 1973. Application by appellant for an adjournment was refused. Further hearing was held on February 27, and 28, and adjourned further to March 14 and 15, April 12, 13, 25, 26 and 27 and May 3 and 4, 1973. The appellant then applied to the High Court for leave to apply by way of Notice of Motion for an order of Prohibition and an Order was made on March 7, granting leave to move for an order, prohibiting the General Court-Martial, or alternatively, its President and Members, from proceeding with the hearing of the charge against the appellant. The Motion filed on March 9, 1973 was presumably mentioned on March 13, 1973 in accordance with the Order of March 7, 1973 and adjourned to October 3, 1973 for hearing, when it was dismissed and the Interim Order dated March 7, 1973 was also set aside. Hence this appeal.

It may be convenient here to set out in full Rule 36:—

"36.—(1) The accused, before pleading to the charge, may offer a plea to the jurisdiction of the court. If he does so:—

(a) the accused may adduce evidence in support of the plea and the prosecutor may adduce evidence in answer thereto; and

(b) the prosecutor may address the court in answer to the plea and the accused may reply to the prosecutor's address.

(2) If the court allow the plea they shall adjourn and report to the convening officer.

(3) When a court report to the convening officer under this Rule, the convening officer shall:—

(a) if he approves the decision of the court to allow the plea, dissolve the court;

(b) if he disapproves the decision of the court:—

(i) refer the matter back to the court and direct them to proceed with the trial; or

(ii) convene a fresh court to try the accused."

The note to this Rule reads:—

"The following are examples of reasons which might be put forward as to why an accused is not subject to the jurisdiction of the court:—

(a) ....

(b) ....

(c) that the charge against him has not been investigated by his C.O. in the prescribed manner, see A.A. 1955 section 76 and rules 7-13; or

(d) ...."

The plea to the jurisdiction rested on non-compliance with section 42 of the Malay Regiment Enactment (F.M.S. Cap. 42) in that the Commanding Officer of the appellant had not investigated into the charge against him. "The proceedings relating to plea of jurisdiction under RP 36" appear at pages 64 to 83, as exhibit "KPK-1", attached to the affidavit of the appellant, affirmed to on July 3, 1974. The record of those proceedings should have been filed, as soon as could be, in support of the Motion for an Order of Prohibition, but was now introduced in reply to an affidavit of a witness, Major Idrus bin Maaris, who had given evidence at the General Court-Martial, affirmed to nearly ten months after the ruling of the court. Four other affidavits of the same date, November 9, 1973, by four other Army high ranking officers were filed to challenge the conclusion of the court as to who was the C.O. of the appellant at the material time. Another witness, who had given evidence, Major Hasbullah bin Yusof, also affirmed an affidavit of the same date, either in supplement to, or in correction of, his earlier evidence. It is to be noted that at the hearing "The Prosecution states that it is not calling

any witness in answer to the plea of the jurisdiction under RP 36" (page 78). The admissibility of these late affidavits is questionable. It would seem more desirable that, having regard to the remedy sought, the learned judge should confine himself to determining the correctness of the General Court-Martial's decision upon the evidence recorded by that court and to the question whether the purported action under Rule 36(3)(b) could be upheld. An analysis, by scrutiny of these affidavits would show them to be of little worth. But the judge said it was "after considering the materials before me, I was satisfied that Major Idrus was the Commanding Officer of the applicant at the material time. He acted properly and in accordance with the procedure governing the methods of investigating charges. To my mind there was sufficient compliance with section 42(1) of the Malay Regiment Enactment Cap. 42." The Order appealed from specifically confirmed that the decision rested on those affidavits. It looked more like a re-trial, but here the appellant had not that advantage of cross-examining the deponents which he had at the General Court-Martial.

The learned judge asked "Who was the applicant's Commanding Officer at the material time? This is the question that I shall first of all determine." Then he went on: "Col. Abul 'As, Commander of the Kuala Lumpur Garrison as from June 1, 1972 affirmed that Major Idrus Maaris the Camp Commandant, Camp Ministry of Defence was the Commanding Officer of the applicant at the material time. He also affirmed that Major Idrus conducted the investigation. This was done in accordance with section 42(1) in the manner prescribed by Rule 7 of the Rules of Procedure." This statement was almost word for word paragraph 8 of the affidavit of Col. Abul 'As, which begins "I had no doubt" and defies challenge to his statement that Major Idrus as *Camp Commandant* was Commanding Officer. He gave no authority for so saying and no mention was made how Col. Mohamad Daud, as Head of the Directorate of Army Training to which unit the appellant was attached at the material time, ceased to have or exercise command over the appellant. Reliance was next placed upon the affidavit of Major Idrus, who affirmed that "by virtue of his (the applicant's) attachment to the Directorate of Military Training, *Ministry of Defence*, he (Major Idrus) was the Commanding Officer of the applicant," "when his" (Major Idrus) appointment was "Camp Commandant, *Camp Ministry of Defence*." No reference was made to his testimony before the General Court-Martial where he made the following statements:

"Since I can't deal with the case, I referred it to higher authority, i.e. K.L. Garrison. As far as I was concerned I had nothing more to do with the case. I did not investigate the case by personally taking evidence from them (i.e. witnesses).

Maj. Kee (the accused) ... was posted to Mindef but *administratively* he came under Camp Mindef.

He was posted to Training Directorate on 1/8/71. *Training Directorate is different from Camp Mindef.*

From 1/8/71 up to now the accused had been under my command in matters of discipline and administration. Col. Daud is head of Training Directorate. The accused comes under Col. Daud in operational duties. I am the accused's *C.O. in* all *matters of discipline* and administration *to all intents and purposes.* Col. Daud is in charge of training and *in this matter the accused is under him.*

I am in charge of all persons of the rank of Major and below in matters of discipline in Mindef' (Note: not Camp Mindef alone) 'excepting persons in the Intelligence Corp. I can't off hand produce authority for my previous statements.'

I have no power to mete out punishment to officers ... on disciplinary matters but only to Sgts. and below.

Camp Mindef is one of the branches of Mindef and the branches of Mindef and the *Training Directorate is another branch.*" (The italics are mine).

The next deponent mentioned in the judgment was Col. Yaacob bin Mohd. Zain who said appellant was posted as Staff Officer Grade II in the Directorate of Army Training on August 2, 1971, and that by virtue of such posting came under the jurisdiction of Camp Commandant, Camp Ministry of Defence *for purpose of administration and discipline* (italics are mine). He went on to say: —

"Throughout the history of the Malaysian Army dating back to the time the Royal Malay Regiment was formed in 1933. there has not been a single case of an Army Officer of the rank of Lieutenant-Colonel (which is the rank of a Commanding Officer of a Battalion or Regiment) or of higher rank. having been charged with or tried for an offence.

There can be no question therefore of an officer of the rank of Lieutenant-Colonel or above being charged before the Camp Commandant....

It would not be in the interest of the Service as a whole to subject him to a public trial for the embarrassment caused even if he were eventually acquitted would make it impossible for him to retain the full and unremitted respect and faith of the officers and men who serve under him. The practice or the tradition of the Service has been to report the conduct of the officer to the Armed Forces Council....

The disciplinary powers of the Camp Commandant, Camp Ministry of Defence as a Commanding Officer, must therefore be viewed in the light of the custom of the Service as extending to officers serving in the Ministry of Defence of up to the rank of Major only. *By virtue of his appointment, it is* also *the custom of the Service that the Camp Commandant,* Camp Ministry of Defence, *is the superior officer* to any officer of the rank of Major serving in the Ministry of Defence...." (Italics are mine).

The italicized words show that Col. Yaacob has not assisted in any way to answer the question the judge asked himself, except by equating "superior officer" by custom of the Service to be the "commanding officer" despite the definition set out in section 124(7) which I now reproduce:—

"the expression 'Commanding Officer' means the officer for the time being in command of the Regiment and *in the case of a detached portion thereof the officer in command of such detached portion.*" (Italics are mine).

Section 117A also sheds light on who is a "Commanding Officer." It reads (only relevant portion set out):

"Any officer ... may be attached to any unit or detachment of the armed forces ... and while he is so attached the officer commanding such unit or detachment, shall be deemed to be his commanding officer."

Section 42(1) is mandatory and imposes the duty upon a commanding officer, where he thinks the charge ought to be proceeded with "to take steps for bringing the offender to court-martial."

Col. Mohamad Daud, Head of Military Training to which unit the appellant was attached, would, as any one naturally expect, be the officer 'in command' and the one to answer the question posed. His affidavit was not referred to by the learned judge. My perusal of it showed that the deponent was singularly evasive and surprisingly uncertain as to his status vis-a-vis the appellant. He said there:—

"4. In my capacity as Director of Army Training I was to ensure that Major Kee Peng Kwan like any other Staff Officer in my Directorate carry out his routine staff function efficiently in accordance with his schedule of duties.

5. As head of Training Directorate I have no disciplinary powers over Major Kee Peng Kwan and other members of my Training Staff.

6. The Camp Commandant, Camp Ministry of Defence is the *appropriate authority* to remand Major Kee Peng Kwan for trial by court-martial." (italics are mine).

Brigadier-General Selvarajah s/o Narayanapillai was more positive and I quote:—

"1. I am holding the appointment of Chief Engineer of the Malaysian Army.

2. Major Kee Peng Kwan was posted to the 'X' list and attached to the Engineer Branch, Ministry of Defence....

3. I am not the Commanding Officer of Major Kee Peng Kwan for the purpose of trying that officer summarily or of remanding that officer for trial by Court-Martial."

It is hardly necessary to refer to Major Hasbullah who took the Abstract of Evidence on direction of Major Idrus. He was under the command of Lt.-Col. Berham bin Ahmad of 1, Malaysian Special Service Regiment. He was clear that "Major Idrus was not my Commanding Officer", as he told the Court-Martial.

I am of the view that the materials before the court, if they were relevant, were insufficient to show that Major Idrus was the Commanding Officer of the appellant according to law. I am of the view that the Court-Martial of army personnel were best competent to decide, upon evidence which they had heard and upon submissions of the prosecution and defence, that the investigation had not been initiated by appellant's commanding officer in accordance with section 42 of Cap. 42. I am satisfied that in coming to the conclusion that it had no jurisdiction, the Court-Martial must have acted on advice of the Judge-Advocate. Rule 80(3) provides that "he shall advise the court upon *all questions of law* or procedure... The court *shall accept his advice on all such matters.*" In my view, both in fact and in law, there would appear to be no foundation for overruling the finding of the Court-Martial on the question of absence of jurisdiction. The onus of proof of compliance with section 42 was upon the prosecution.

The question of the validity of Rule 36 was brushed aside with the observation that "the applicant has failed to provide me with any authority to enable me to arrive at a finding that the provision conferring power upon the Convening Officer under Rule 36 was *ultra vires* and unconstitutional." That appears to me, however, to be a fair and proper remark. The Rule appears, as contended by counsel, to place an unfettered and absolute discretion on the Convening Officer. I need not go into the Indian authorities, but I find that a note to Rule 36 referred to Rule 95(3) in relation to confirmation. I now set out the relevant portion:—

"(3). When a court *have rejected a plea* to the jurisdiction ... it shall not be necessary for the confirming officer to approve specifically the decision of the court, but his approval shall be implied from his confirming the finding on the charge to which the plea relates. *If he disapproves the decision of the court to reject the plea* ... he shall withhold confirmation of the finding on the charge to which the plea relates."

The specific reference to confirmation where there has been a rejection of a plea to the jurisdiction would lead to the inevitable inference that the Convening Officer has no power to disapprove where a plea to jurisdiction has been allowed. The maxim "*Expressio unius exclusio alterius*" would apply. Bearing in mind that jurisdiction is a question of law and that the Court-Martial had had the benefit of the advice of the Judge-Advocate, which they must accept, before coming to its decision, I am of the opinion that in disapproving that decision, the Convening Officer was acting *ultra vires*. In effect, he would be arrogating himself the authority to confer jurisdiction on a court and be acting contrary to law. The normal rule is a strict construction and such a power cannot be implied or presumed.

I would therefore allow the appeal and set aside the order of the High Court and direct that there be an order in terms of the Motion other than as to costs, as to which there will be, by consent, no order.

Chang Min Tat J.: I have the advantage of reading the judgment in draft of my brother Ong Hock Sim F.J. and with respect agree with him that the appeal should be allowed. I would however add a few words.

The view of the Convening Officer, Colonel Abul 'As bin Ismail, Commander of the Kuala Lumpur Garrison as from June 1, 1972, that the Court-martial erred in allowing the plea to jurisdiction was expressed by him in these words:

"Major Idrus bin Ma'aris by virtue of his appointment as Camp Commandant, Ministry of Defence, is the Commanding Officer of all officers and other ranks on the posted strength or attached to any Division/Department in the Ministry of Defence. I am satisfied that the Commanding Officer of the accused did investigate the charge in the prescribed manner."

But the view he took was patently wrong for several reasons. That being so, his order to the Court-martial, all other arguments apart, cannot stand.

In the first place, it ignores the definition of "Commanding Officer" in the Malay Regiment Enactment:

"The expression 'Commanding Officer' means the officer for the time being in command of the Regiment and in the case of a detached portion thereof the officer in command of such detached portion."

In the same way as the Chief of General Staff is the over-all commander of the Army Staff Division, Major Idrus bin Maaris may be the Commandant of Camp Mindef but that does not make him the Commanding Officer of the appellant until and unless he is the head of the unit to which the appellant has been posted.

Secondly, in view of the evidence in some of the affidavits filed contra the application for an order of prohibition that there are officers above the rank of Major posted to Camp Mindef it just cannot be true as Colonel Abul 'As bin Ismail in his direction to the tribunal held, that Major Idrus bin Maaris is the Commanding Officer of all officers and other ranks attached to any Division/Department in the Ministry of Defence. In an organisation where rank is sacrosanct and where efficiency is wholly dependent on communication down the chain of command, it is not possible to visualise a Colonel or a Brigadier, e.g., coming under the command of a Major. But by the yard-stick employed by him, the Convening Officer himself, Colonel Abul 'As bin Ismail, Commander, Kuala Lumpur Garrison, Colonel Yaacob bin Mohd. Zain, Colonel in charge of Administration in the Army Staff

Division and Colonel Mohamed Daud bin Abu Bakar, Director of Army Training in the Army Staff Division, Ministry of Defence as "officers on the posted strength or attached to any Division/Department in the Ministry of Defence" must come under the command of a junior-ranking officer, Major Idrus bin Maaris.

It was however suggested that the question of disciplinary measures being taken within Camp Mindef against any officer above the rank of Major had never arisen. This did not mean that such a question might never arise. If it ever should, then in this set-up, the public would be treated to the spectacle of a higher-ranking officer coming under the command of an officer his junior in rank. It might of course be a mere coincidence (and a great tribute) that no officer of such exalted rank had been so disciplined in the history of the Malay Regiment and the Malaysian Army, but it would be startling to hear of any suggestion, as it would appear from an affidavit, that a line was drawn separating majors and officers of lower rank from officers above the rank of major for the purpose of discipline, and that court-martials were meant for the former and not for the latter group and that for this reason, it was not incongruous for a Major to be the Camp Commandant of all officers, whatever the ranks, posted to Camp Mindef. For myself, I am not sure that Colonel Yaacob bin Mohd. Zain really meant what he would appear to have affirmed to in his affidavit.

In my view, and with respect, the definition of Commanding Officer in the Malay Regiment Enactment fits Colonel Mohamad Daud bin Abu Bakar, the Director of Army Training in the Army Staff Division, Ministry of Defence, to which the appellant was at all relevant times posted. The appellant himself stated in no uncertain terms that he regarded this officer as his commanding officer. This officer himself admits that the appellant was posted to "my directorate" and that in his capacity as Director of Army Training he was to ensure that the appellant like any other Staff Officer in his directorate carried out his routine staff functions efficiently in accordance with his schedule of duties. This must imply that he was the officer ordinarily empowered to give commands to the appellant in the execution of his duties, and would know if there was any inefficiency, dereliction of duty or insubordination. Even then, he said that he had no disciplinary powers over the appellant or any other members of his Training Staff. This was a strange dichotomy of responsibility in a superior officer. No reason for this division was ever advanced, and no explanation given for a new definition of a commanding officer.

A court-martial like any other inferior court of justice in the country is subject to the over-all supervision of the High Court: see *Grant* v. *Gould & Ors.* (1792) 2 Hy. Bl. 69 where the court held that the question of the jurisdiction of the Court-martial was material to the consideration whether prohibition would issue. With respect, on the conclusion that the affidavits, apart from any question as to their admissibility, do not support the view of the Convening Officer, prohibition must lie and an order issue.

This conclusion relieves me from having to deal with a question that frankly bothered me greatly at the hearing. It was: Could the Convening Officer acting under Rule 36(3)(b)(i) of the Rules of Procedure over-rule the finding of the Court-martial as to its jurisdiction? I am aware Rule 36 would appear to permit him to do so. I also concede that, as said, a court-martial is "neither fish nor fowl." But rules of procedure are laid down and provisions are also made for rules of evidence. Though the rules of procedure are somewhat laxer than our Criminal Procedure Code and the rules of evidence are the looser ones of England and not those of our strict Evidence Act, a Court-martial is never-the-less by these rules an exercise in the Rule of Law. For the Convening Officer to do as he did would mean that he had over-ruled a finding of a competent court of jurisdiction and he would be doing so, sitting alone and in camera, and of his own motion, that is to say. without benefit of arguments. It would also be to exercise virtual powers of appeal where no appeal lay.

Suffian L.P. concurred.

Appeal allowed.

Solicitors: *Ram, Rais & Yap.*

SARAWAK ELECTRICITY SUPPLY CORPN. v. WANG TECK CHAI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) April 23, 1975]

[Kuching — Federal Court Civil Appeal No. 118 of 1974]

Employment — Termination of employment by statutory corporation — Sarawak Electricity Supply Corporation Ordinance, 1962, s. 30.

In this case the appellants had given the respondent one month's notice of termination of services. The respondent thereupon brought an action to the High Court for wrongful termination and dismissal. The learned trial judge held that the respondent had been wrongfully dismissed in contravention of the rules of natural justice. The appellants appealed.

Held, allowing the appeal: the appellants in this case had lawfully exercised their right to terminate the services of the respondent.

Case referred to:-

(1) *Government of Malaysia* v. *Lionel* [1974] 1 M.L.J. 3.

FEDERAL COURT.

J. Grimberg (*Yap Han Boon* with him) for the appellant.

S. Sahathevan for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): We allowed the appeal of the Sarawak Electricity Supply Corporation from a judgment of the High Court at Kuching awarding the respondent the sum of $40,181.55 with interest thereon at the rate of 6% per annum from the July 16, 1974 until payment with costs to be taxed on the higher scale for wrongful termination of the respondent's employment with the Corporation. We said we would give our reasons. We now do so.

The respondent commenced employment on November 1, 1957 with the Sarawak Electricity Supply Co. Ltd. On December 14, 1959 the respondent signed a letter in the following terms:—